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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

278
No.

ROGER TOUHY,
Petitioner,
vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS AND BRIEF IN
SUPPORT THEREOF.

EDGAR B. TOLMAN,
THOMAS I. MEGAN,
HOWARD B. BRYANT,
Attorneys for Petitioner.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, Roger Touhy, respectfully shows unto
the Court the following:

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STATEMENT OF THE MATTER INVOLVED.

1. The Hamm case.

In 1933 your petitioner was charged with having kidnapped one Alfred Hamm, Jr. The case came on for trial in a district court of the United States for the District of Minnesota. On the trial of that case the jury found your petitioner not guilty.

Your petitioner has always contended that he was not guilty of that offense and that the indictment was due to the activities of petitioner's enemies. The real kidnappers of Hamm confessed two years later. (R. 6) During the trial of the *Hamm* case at St. Paul in 1933, the Cook County grand jury indicted petitioner for the supposed kidnapping of the notorious John "Jake the Barber" Factor. (R. 7, 11) After his acquittal in St. Paul petitioner waived extradition and returned to Chicago to face his accusers in the Factor case.

2. The Factor "Kidnapping" case.

The first trial of that case terminated when the Judge discharged the jury at a time when they stood 10 to 2 or 8 to 4 for petitioner's acquittal. (R. 7) Thereafter a second trial took place which resulted in a verdict of guilty.

On February 24, 1934 the trial court entered judgment on the verdict and petitioner stood convicted in the Criminal Court of Cook County, Illinois of kidnapping John Factor for ransom. (R. 2)

Petitioner sued out a writ of error in the Supreme Court of Illinois. That Court affirmed the conviction. (*People v. Touhy*, 361 Ill. 332.)

3. The Habeas Corpus case.

In 1938 petitioner sought release by a petition for habeas corpus in the Supreme Court of Illinois but that Court without opinion denied him leave to file the petition. This Court denied certiorari, (*Touhy v. Ragen*, 303 U.S. 657).

4. The Newly Discovered Evidence.

In October 1934, Factor told Thomas C. McConnell, a prominent member of the Chicago Bar, that he had not

been able to see anyone during the holding for ransom but that he swore to the identification of Touhy "anyway." (R. 3) Petitioner's counsel in this proceeding, Charles P. Megan, who has now departed this life, learned of this confession of perjury by the state's principal witness, in October 1945 during a conversation with Mr. McConnell and communicated this fact to petitioner some time later. (R. 3).

In the Petition for Writ of Error Coram Nobis it is alleged that Factor had obtained by fraud \$7,500,000 from British investors and fled to the United States, (R. 3); that Thomas C. McConnell was retained by Factor's British victims to bring legal proceedings against Factor in the United States courts; that that suit was settled by paying to the British investors or some of them \$1,300,000 and the civil action in this country was dismissed; that after that suit against Factor was settled, Factor asked McConnell to go to England for the purpose of securing the dismissal there of the criminal proceedings against him for which an extradition warrant for his return to England was outstanding; that McConnell declined to do this, and Factor went on to tell of his false identification of petitioner at the kidnapping trial as above stated. (R. 3) This confession of perjury was some eight months after the trial in the Factor "kidnapping" case. (R. 3)

Petitioner urges that this confession by Factor completely undermines the entire case on which the prosecution of Roger Touhy was based. The state has admitted that Factor's testimony identifying petitioner was "indispensable" in the trial, (R. 15) and Factor himself considers that his testimony resulted in the petitioner's conviction. (R. 14) Thus Factor stated in a recent petition to this Court for a writ of habeas corpus whereby he sought release from imprisonment for mail fraud as fol-

lows: "The testimony of your petitioner against said Touhy resulted in the conviction of Touhy in the Criminal Court of Cook County, Illinois for the kidnapping of your petitioner, by reason of which said Touhy was sentenced to the equivalent of a life sentence in the Illinois State Penitentiary." (R. 14-15)

5. The Error Coram Nobis case.

The Factor confession of perjury is the central point in the present case in which petitioner on August 10, 1946 brought his sworn Petition for a Writ of Error Coram Nobis in the court of his conviction seeking a hearing on the allegations above set forth, and others referred to below, to the end that he be granted a new trial in which the newly discovered evidence might be introduced, and in which he might have a fair trial with due process of law. The Criminal Court of Cook County dismissed the Petition for a Writ of Error Coram Nobis, without a hearing thereof, solely on the grounds advanced by the state, namely, that the five year limitation in the statutory substitute for the writ of error coram nobis in Illinois, (R. S. Ill. Chap. 110, Sec. 196) was a bar to the petition since that limitation applied to criminal proceedings and more than five years had elapsed since the date of petitioner's conviction. (R. 113) The court also sustained the state's demurrer to the petition. (R. 113) On appeal, the Supreme Court of Illinois affirmed the dismissal of the petition holding that the statutory five-year limitation on coram nobis was a complete bar (R. 120) and that error coram nobis was not available in Illinois for the presentation of newly discovered evidence of perjury on the trial. (R. 121)

Petitioner claims that by holding that the Petition for Writ of Error Coram Nobis is barred by the statute of limitations contained in Section 72 of the Illinois Civil

Practice Act and that in proceedings for the writ of error coram nobis, newly discovered evidence could not be presented to the Court, the Supreme Court of Illinois deprives the petitioner of the right, assured by the Constitution of the United States, to an ancient and still existing remedy for the review of a case in which the judgment of conviction has been based on perjured testimony.

Petitioner now seeks a review of that decision by this petition for a writ of certiorari from the Supreme Court of the United States to the Supreme Court of the State of Illinois.

The allegations deemed insufficient in prior appeals did not include the newly discovered evidence of perjury by the principal witness, Factor. As above stated, this confession of perjury was first brought to the attention of any court in the present Petition for a Writ of Error Coram Nobis, and no hearing has ever been had thereon except as above stated.

The petition in the error coram nobis proceeding also sets forth in detail the perjury of the only other two witnesses at the trial who identified petitioner, (R.8,9,10). And further the petition in the error coram nobis proceeding sets forth that the prosecuting officials caused to be introduced in evidence at the trial testimony of Factor and the other two identifying witnesses knowing, or with reasonable means of knowing, that their testimony was unworthy of belief. (R.11)

And so, the Court is here presented with a petition which has been denied by the Illinois courts without hearing but which shows that on the trial petitioner was denied rights assured to him by the Constitution of the United States. As elsewhere stated and here repeated, the matter

here involved is a plea for a fair trial in Illinois, something your petitioner has never had. Petitioner refers to his sworn allegations in the petition for Writ of Error Coram Nobis and in other parts of the records in the various proceedings which make up the history of this case.

II.

BASIS OF THIS COURT'S JURISDICTION.

The jurisdiction of this Court is invoked under that part of Section 237(b) of the Judicial Code of the United States (U.S.C. Title 28, Sec. 344 (b)) reading as follows:

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination . . . any cause wherein a final judgment or decree has been rendered . . . by the highest court of a State in which a decision could be had where . . . any . . . right, privilege or immunity is specially set up or claimed by either party under the Constitution . . .

Petitioner raised substantial federal questions in his Petition for Writ of Error Coram Nobis in the Criminal Court of Cook County, stating under oath:

(1) That he has been denied the equal protection of the laws and deprived of his liberty without due process of law. (R. 10)

(2) That his conviction was based on the false testimony of the principal witness, Factor. (R. 2)

(a) That Factor has now confessed to this perjury. (R. 2)

(b) That knowledge of this perjury and confession

did not come to petitioner until after it had come to the knowledge of his counsel, Charles P. Megan, who informed petitioner of this newly discovered evidence in 1945, eleven years after his conviction. (R. 3)

(3) That the perjured testimony of Factor, Costner and Henrichsen (the only witnesses at the trial who identified petitioner (R. 9)) was introduced in evidence at the trial by representatives of the State of Illinois, knowing, or with reasonable means of knowing, that no one of these three men could be believed under oath and that their testimony was false. (R. 11)

Rule 12 of this Court requires a showing that the questions involved are "substantial". Surely a conviction and sentence of imprisonment in a penitentiary for 99 years on perjured testimony shows, without more, that substantial questions are here involved. The fact that petitioner has exhausted every remedy under Illinois law for his application for a new trial, without avail and without securing an opportunity to demonstrate that perjury presents further grounds for believing the questions involved to be substantial. And lastly, it is a substantial question, to one who claims protection of rights vouchsafed by the Federal Constitution, whether the Supreme Court of the United States may review convictions where the law of a state has been so interpreted by the highest court of that state as to leave petitioner remedyless in the courts of that state for a violation of those rights.

The court of first instance on October 24, 1946, sustained the state's plea of the statute of limitations in bar of the right of action. That decision was based on the five year limitation contained in the statute which abolished the writ of error coram nobis and provided a substitute for that writ (Illinois Civil Practice Act, Section 72 [R. S.

Ill. Chap. 110, Sec. 196] (R. 113)). The statutory provision is set out in the margin.*

The lower court also sustained the State's demurrer and dismissed the petition. (R. 113)

The Supreme Court of Illinois on March 19, 1947, affirmed the lower court's decision, *People v. Touhy*, 397 Ill. 19. See Appendix at pages 11 to 19 post. The Supreme Court of Illinois held that the five year limitation was a complete bar to the petition (R. 120) (pp. 17-18 post) and that the writ of error coram nobis was not available as a remedy herein. (pp. 18-19 post) (R. 121) Although in his Petition for Rehearing in the Supreme Court of Illinois, petitioner set forth that this decision deprived him of his fundamental rights under the United States Constitution (R. 128), the Supreme Court of Illinois on May 19, 1947, denied that petition. (R. 129)

III.

THE QUESTIONS PRESENTED.

The questions presented to the Court are:

1. Whether, under the Constitution of the United States, the courts of Illinois are required to provide a corrective judicial process and grant petitioner a hearing on the merits of his petition for a new trial where:

(a) newly discovered evidence of perjury at the trial is of such a character as completely to under-

* "The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

mine the entire case on which the prosecution was based;

(b) the representatives of Illinois responsible for the prosecution of petitioner, caused to be introduced into evidence at the trial testimony which they knew, or had reasonable means of knowing, to be false;

2. Whether the Supreme Court of Illinois deprived the petitioner of all remedy for unlawful deprivation of his liberty through its holding that the correction of errors under a writ of error coram nobis was barred by the time limitation contained in the Act which created a substitute remedy for that writ?

3. Whether the Supreme Court of Illinois deprived the petitioner of all remedy for unlawful deprivation of his liberty through its holding that newly discovered evidence could not be received in a proceeding for a writ of error coram nobis?

4. Whether, since the petitioner has exhausted all remedies under the law of Illinois as interpreted by the Illinois Supreme Court, the petitioner is entitled to have a review by certiorari in the Supreme Court of the United States of the action of the Illinois courts in denying his rights under the Federal Constitution and whether this Court should not now in this proceeding administer the appropriate remedy for the protection of those federal rights by reversing the judgment below and ordering a new trial of the charge of kidnapping?

IV.

REASONS RELIED UPON FOR ALLOWANCE
OF THE WRIT OF CERTIORARI

The courts of Illinois have declined to hear petitioner's case on the merits. In so doing they have deprived him of fundamental rights to a fair trial under the Federal Constitution and have decided federal questions in a way not in accord with applicable decisions of this Court.

The Supreme Court of Illinois based its affirmance of the lower court's dismissal of the Petition for a Writ of Error Coram Nobis on the grounds that the time limitation in the statutory substitute for this writ in Illinois was a complete bar to the action (R. 120) and that the writ is not available in Illinois for newly discovered evidence. (R. 121) In spite of the strong case made on this record, the decision effectively closes the door to all relief for this petitioner in the state courts. The writ of error coram nobis was his last remaining avenue for relief in the Illinois Courts—the only remedy whereby he might have obtained his constitutional right to a hearing and to a fair trial. That relief has been denied him. Petitioner has stated in his sworn Petition for a Writ of Error Coram Nobis that Factor, the state's principal witness at the trial, has confessed that although he did not see petitioner he swore to his identification at the trial anyway. (R. 2) Knowledge of this confession of perjury came to the petitioner in 1945 through his then counsel, Charles P. Megan. (R. 3) The confession is of such a character as completely to undermine the entire case on which the prosecution was based.

ROGER TOUHY,

By EDGAR B. TOLMAN,

THOMAS I. MEGAN,

HOWARD B. BRYANT,

His Attorneys.

APPENDIX

397 Ill. 19.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

vs.

ROGER TOUHY,

Appellant.

Opinion filed March 19, 1947,

Rehearing denied May 19, 1947.

MR. JUSTICE WILSON delivered the opinion of the court:

February 24, 1934, a jury in the criminal court of Cook county found Roger Touhy guilty of the crime of kidnapping John Factor for ransom and fixed his punishment at ninety-nine years' imprisonment in the penitentiary. Judgment was rendered on the verdict. Touhy prosecuted a writ of error from this court to the criminal court. On June 14, 1935, the judgment was affirmed and, on October 2, 1935, a petition for rehearing was denied. (*People v. Touhy*, 361 Ill. 332.) Thereafter, on February 15, 1938, Touhy presented his petition for a writ of *habeas corpus* to this court. (*People ex rel. Touhy v. Ragen*, No. 24616.) The petition was denied on February 18, 1938. The United States Supreme Court, on March 28, 1938, denied his petition for a writ of *certiorari* to this court. (*Touhy v. Ragen, Warden*, 303 U.S. 657.) On August 10, 1946, Roger Touhy filed in the criminal court of Cook County a petition for a writ of error *coram nobis* seeking a new trial. The People interposed a plea in bar setting up the five years' limitation period and, also, a demurrer. The plea and the demurrer were both sustained, and Touhy's petition dismissed. This appeal followed.

We deem unnecessary a narration of all the detailed

facts alleged in the petition. Our opinion in *People v. Touhy*, 361 Ill. 332, contains an exhaustive review of the evidence adduced upon the trial. John Factor identified Roger Touhy as one of the kidnappers. The latter's conviction rested, in large measure, upon the testimony of Factor, Isaac Costner and Walter Henrichsen. The principal ground urged by Touhy in his petition for a writ of error *coram nobis* is that the testimony of Factor, Costner and Henrichsen was false. In particular, the petition alleges that, in October, 1934, Factor told Thomas C. McConnell, a Chicago lawyer, he had not been able to see anyone during the holding for ransom on account of a bandage over his eyes, but, nevertheless, swore to the identification of Touhy. This alleged statement is consistently referred to in the petition and in Touhy's briefs as a confession. Additional allegations are that Factor's statement to McConnell did not come to the knowledge of Touhy's counsel until October, 1945, and to the knowledge of Touhy himself still later. Touhy also alleges that Costner's testimony upon the trial was false. Henrichsen is now deceased, and statements are made in Touhy's brief that "his evidence was unimportant" and "The false testimony of Henrichsen was not of great significance."

The gist of the principal contentions made by Touhy's petition is that his conviction rests upon Factor's false identification of him as one of the perpetrators of the kidnapping and the supporting testimony of Costner, also charged to be false, and upon the asserted arbitrary action of the trial judge in refusing to allow a reasonable time for Touhy's counsel to prepare for the argument of his motion for a new trial. As stated in Touhy's brief, "This confession of perjury by the principal witness [Factor] is the central point of the case. The newly discovered evidence is 'of such character as completely to undermine the entire case on which the prosecution was based'."

An examination of the petition for *habeas corpus* filed in this court, more than eight years before instituting the present action, discloses that Touhy alleged Factor's testimony in the trial upon the indictment for kidnapping was false, and, also, that Costner committed perjury upon the trial. He averred that knowledge of the facts alleged first came to him immediately preceding February 14, 1938. The petition for *habeas corpus* was supported by eleven affidavits. The present petition for a writ of error *coram nobis* is not supported by a single affidavit.

As recounted, the People filed a plea in bar placing reliance upon section 72 of the Civil Practice Act and, also, a demurrer averring that the allegations of the petition, to the effect that Touhy's conviction resulted from the contrivances of the prosecuting witness, John Factor, and the false testimony of Factor and Costner are not matters or grounds for relief in the present action; that allegations on rulings with respect to the evidence, the time for considering the motion for a new trial and that new evidence has been discovered are not matters relievable by an action in the nature of a writ of error *coram nobis* and, further, that allegations as to violations of Touhy's rights in the criminal trial are not within the purview of the matter for which the writ lies.

Although petitioner captions his pleading a "Petition for Writ of Error Coram Nobis," we treat it as a motion in the nature of a writ of error *coram nobis*. Eighty years ago, in 1867, this court, in *McKindley v. Buck*, 43 Ill. 488, speaking through Mr. Justice Breese, observed: "This old writ [writ of error *coram nobis*] has never been in use in this State, and it has fallen into desuetude even in England. Its place is most effectually supplied by the more summary proceedings, by motion in the court where the error in fact occurred." Shortly after this decision

was rendered, the General Assembly expressly abolished the common-law writ of error *coram nobis*. (Laws of 1871-72, p. 348.) Its abolition appeared as section 66 in an act entitled, "An Act in regard to practice in courts of record." The Practice Act of 1907, as did earlier statutes, declared "The writ of error *coram nobis* is hereby abolished," (Smith-Hurd Stat. 1933, chap. 110, par. 89,) and section 72 of the Civil Practice Act, now in force, (Ill. Rev. Stat. 1945, chap. 110, par. 196,) provides: "The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years." The power of the legislature to abolish the common-law writ of error *coram nobis* is not open to question. "An Act to revise the law in relation to the common law," approved March 5, 1874, ordains that the common law of England, so far as applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply defects of the common law, prior to the fourth year of James the First, (with certain exceptions not material here,) and which are of a general nature and not local to that kingdom, "shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority." (Ill. Rev. Stat. 1945, chap. 28.) The legislative authority to abolish the common-law writ of error *coram nobis* has been repeatedly exercised.

Touhy contends that the five years' limitation period in section 72 of the Civil Practice Act is inapplicable to criminal cases. This contention and the supporting argument are based upon the fallacious premise that proceedings upon motions in the nature of a writ of error *coram nobis* are criminal proceedings when the motions are sequels to judgments rendered in criminal cases. Touhy does not make the contention that section 72 of the Civil Practice Act is unconstitutional but urges that an interpretation applying the statute to petitions or motions in the nature of a writ of error *coram nobis* in criminal cases would render the section unconstitutional. The precise point advanced is that if section 72 applies to criminal proceedings, it would violate section 13 of Article IV of our constitution, providing that no act shall embrace more than one subject and that it shall be expressed in the title.

The purpose of the writ of error *coram nobis* at common law, and of the motion substituted for it by section 72, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. (*Linehan v. Travelers Ins. Co.*, 370 Ill. 157; *Chapman v. North American Life Ins. Co.*, 292 Ill. 179; *Cramer v. Illinois Commercial Men's Ass'n.*, 260 Ill. 516.) Illustrative of such matters are the disability of the parties to sue or defend, namely, death of one or more of the parties, death of a joint party, infancy, coverture and insanity, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. (*Jacobson v. Ashkinaze*, 337 Ill. 141; *Marabia v. Mary Thompson Hospital*, 309 Ill. 147; *Chapman v. North American Life Ins. Co.*, 292 Ill. 179.) On the other hand,

the motion in the nature of a writ of error *coram nobis* does not lie to determine a question of fact which has been adjudicated, even though decided wrongly, nor for alleged false testimony at the trial nor for newly discovered evidence. *People v. Drysch*, 311 Ill. 342.

A motion in the nature of a writ of error *coram nobis* is an appropriate remedy in criminal cases, as well as civil. The statute cotemplates the filing of a motion or petition in the nature of a writ of error *coram nobis* in the first instance in the court rendering the judgment assailed. The motion or petition is the filing of a new action and is civil in its nature. (*People v. Dabbs*, 372 Ill. 160; *People ex rel. Courtney v. Green*, 355 Ill. 468.) The statutory substitute, namely, a petition or motion in the nature of a writ of error *coram nobis* has been adjudged an appropriate remedy in criminal cases, as well as civil, and lies to set aside a conviction obtained by duress or fraud, or where, by some excusable mistake or ignorance of the accused and without negligence on his part, he has been deprived of a defense which he could have used on his trial, and which, if known to the court, would have prevented conviction. (*People v. Dabbs*, 372 Ill. 160; *People v. Green*, 355 Ill. 468.) In *People v. Crooks*, 326 Ill. 266, this court said: "The writ of error *coram nobis*, or a motion under said statute, [section 89 of the Practice Act of 1907,] is an appropriate remedy in criminal cases as well as in civil cases. * * * The sufficiency of the motion, which is regarded as a declaration in a writ of error *coram nobis*, or a motion under the statute, must be raised upon demurrer, plea of *nullo est erratum*, by motion to dismiss, by pleading special matter in confession and avoidance, or by making an issue of fact by traversing the declaration. [Citations.] In this State the issue of fact may be made, and is generally made, by affidavits in

support of the motion and by counter-affidavits denying the facts set up in the motion and affidavits in support thereof, in which case the burden of proof is upon the party making the motion to prove his facts alleged by a preponderance of the evidence. * * * The proceedings in a criminal case are civil in their nature, and the burden is upon the accused to prove his allegations by a preponderance of the evidence." Again, in *People v. Green*, 355 Ill. 468, this court declared that section 89 of the Practice Act did not abolish the essentials of the proceeding under the common-law writ of error *coram nobis*, but that errors such as might have been corrected by the old writ may now be reached by a motion or petition, saying, "It is generally recognized that the proceedings under a motion or petition in the nature of a writ of error *coram nobis* are civil in their nature," and that the statutory motion substituted for the writ of error *coram nobis* is an appropriate remedy in criminal as well as civil cases. This pertinent observation was added, "Since the judgment entered upon such proceeding is final and the proceeding is civil in its nature, either the State or the defendant is entitled to a review of the judgment of the court entered on such motion or petition."

The common law writ of error *coram nobis* and the motion substituted for the old writ by section 72 of the Civil Practice Act are essentially civil in character. This being so, the contention that the present cause is a criminal proceeding cannot stand, and the argument that section 72 is inapplicable to the motion when employed in the criminal court of Cook county must, likewise, fall. We adhere in our decision in *People v. Rave*, 392 Ill. 435, that the five years' limitation under section 72 of the Civil Practice Act applies to all *coram nobis* proceedings. In the *Rave* case we pointed out that the language

in the concluding sentence of section 72, "When the person entitled to make such motion shall be an infant, *non compos mentis* or under duress at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years," contemplates criminal, as well as civil proceedings, because of the exclusion from the period of limitation of such time as the person entitled to make the motion may be under disability or duress. We stated that the language to the effect that the period of five years commences at the time "of passing judgment" can have application only to a criminal case. Upon the authority of *People v. Rave*, 392 Ill. 435, and *People v. Sprague*, 371 Ill. 627, section 72 of the Civil Practice Act is an insuperable bar to Touhy's petition filed August 10, 1946. Legislative power in this regard is not now a debatable constitutional question. *Bradford Supply Co. v. Waite*, 392 Ill. 318.

The disposition of the demurrer to the petition was likewise correct. To the end of avoiding any misunderstanding of this opinion, we are impelled to make additional observations. The petition is not supported by affidavits of either the lawyer to whom John Factor is alleged to have stated that he committed perjury upon the trial in the kidnapping case, or of Factor himself. The allegations, so far as the alleged false testimony of Factor is concerned, are hearsay statements of the highest degree. We do not regard the allegations in the petition as having been taken as true, even for the purpose of disposing of the demurrer. The rule that facts stated in a pleading will be taken as true on a motion to strike, does not extend to conclusions drawn by the pleader. (*Kurtzon v. Kurtzon*, 395 Ill. 73.) Paragraph (3) of section 43 of the Civil Practice Act (Ill. Rev. Stat. 1945, chap. 110, par. 167,) declares, "An answer containing only defenses to the jurisdiction or in abatement shall not constitute an ad-

mission of the facts alleged in the plaintiff's complaint." A petition, as here based on a claim of perjury but not supported by affidavits showing the perjury, does not allege facts but merely conclusions of the pleader based on hearsay matter. Construing the allegations of the petition most favorably to Touhy, to the extent that they charge John Factor, Costner and Henrichsen with testifying falsely upon the trial, they are hearsay and cannot be said to constitute facts.

Irrespective of whether the allegations of the petition be taken as true for the sole purpose of disposing of the demurrer, the contention is not well taken that the common-law writ of error *coram nobis*, or its statutory substitute in this State, is available as a remedy for newly discovered evidence or for alleged perjured testimony. We have this day, in *People v. Gleitsman*, No. 29957, reaffirmed this court's adherence to the rule that writ of error *coram nobis* does not lie to correct false testimony, nor for newly discovered evidence.

This court, in 1934, thoroughly reviewed the record upon the writ of error sued out of this court to the criminal court of Cook County seeking a reversal of the judgment of conviction on the charge of kidnapping John Factor. (*People v. Touhy*, 361 Ill. 332.) In 1938, we carefully considered the petition for *habeas corpus* (*People ex rel. Touhy v. Ragen*, No. 24616,) and the Supreme Court of the United States denied a petition for a writ of *certiorari* seeking a further review. (*Touhy v. Ragen, Warden*, 303 U.S. 657.) The present proceeding has received full consideration by both the trial judge and this court. In each instance, Touhy has been represented by able and experienced counsel both in the trial courts and in the courts of review.

The judgment of the criminal court of Cook County is right, and it is affirmed.

JUDGMENT AFFIRMED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No.

ROGER TOUHY,
Petitioner,
vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

THE OPINION BELOW

The opinion of the Supreme Court of Illinois in this case (the error coram nobis case) is reported in the Illinois official reports as *The People of the State of Illinois v. Touhy*, 397 Ill. 19. It also appears in the appendix to the petition for certiorari at pages 11 to 19, *supra* and in the record at pages 115 to 122.

GROUND OF JURISDICTION.

The jurisdiction of this Court is invoked under that part of Section 237 (b) of the Judicial Code of the United States (U.S.C. Title 28, Sec. 344(b)) reading as follows:

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it

for review and determination . . . any cause wherein a final judgment or decree has been rendered . . . by the highest court of a State in which a decision could be had where . . . any . . . right, privilege or immunity is specially set up or claimed by either party under the Constitution . . .

The rights, privileges and immunities of which the petitioner Roger Touhy has been deprived are the rights referred to in the following provision of the United States Constitution the relevant parts of which are as follows:

FOURTEENTH AMENDMENT—1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. . . .

The specific grounds are stated on pages 6 to 8 of the petition for certiorari, *supra*.

STATEMENT OF THE CASE.

1. **Dramatis Personi.**

(a) *Roger Touhy.*

Roger Touhy the petitioner lived with his wife and two children in one of the choice northwestern suburbs of Chicago. He had a considerable estate there. He was engaged in the business of supplying beer to taverns in those suburbs. (R. 27) His business was conducted on a decent level as was shown by the fact that neither he nor any of his men were ever arrested or charged with any offense. (R. 27) It was a peaceable business conducted in a peaceable and orderly manner. After the repeal of prohibition Touhy's business was carried on along strictly legal lines, the prescribed license fee being paid on every barrel of beer sold. (R. 28)

(b) *Al Capone.*

Al Capone aspired to be the vice lord of Chicago and to monopolize the sale of alcoholic beverages in Chicago and its suburbs. Capone naturally resented the competition of Touhy and tried to take Touhy's business away from him. (R. 28) Frequent references in the record to the "Syndicate" were generally understood as referring to Capone and associates. (R. 28)

(c) *John Factor.*

This man, known as "Jake the Barber", fraudulently secured seven and a half million dollars from British investors and before he fled from England sent a large portion of it to two banks in Chicago. (R. 23) His victims or some of them led by a British clergyman, (R. 84) organized to have Factor extradited to England and for that purpose employed counsel. (R. 3) A warrant of extradition was secured in 1932. (R. 25) Factor was taken into custody but a United States District Judge for the Northern District of Illinois ordered him released on the ground that the offense charged in the extradition proceedings as a crime in England, had not been made a crime in Illinois (R. 25); that decision was reversed by the Seventh Circuit Court of Appeals in *Factor v. Laubenstein*, 61 F. (2d) 626. The Supreme Court heard the argument April 18, 1933, but the case was restored to the docket for re-argument April 29, 1933 and it was re-argued October 9, 1933. (R. 25) On December 4, 1933 (R. 25) this Court held the extradition proceedings valid, *Factor v. Laubenstein*, 290 U.S. 276, (R. 25) and the mittimus was again served on Factor and he was taken into custody but released on habeas corpus by a U. S. Circuit Judge on June 27, 1934 on the ground that more than two months had elapsed since the extradition warrant was re-served

without its being put into effect. (R. 25) (See also statement of fact in *Factor v. Laubenheimer*, 290 U.S. 276, 286.) At one of the intervals at which he was at liberty but subject to re-arrest he claims to have been kidnapped by Roger Touhy (June 30, 1933), (R. 29) but the latter in his sworn statement denies any part in the kidnapping and declares his belief that Factor never was kidnapped. (R. 2) Capone and Factor maintained friendly relations. (R. 5 and 30) Both of them were hostile to Touhy. (R. 28)

John Factor is now serving a ten-year sentence in a federal penitentiary at Sandstone Minnesota upon his conviction in 1942 for mail fraud. He is not a citizen of the United States but is a citizen of Russia. (R. 8)

2. Certain Significant Dates.

Dates under this heading all appear in R. 25.

1932. British Consul applied for a warrant of extradition against Factor.

Jan. 12, 1932. Mittimus (Warrant) in the extradition proceeding served on Factor.

1932. Factor released on habeas corpus by U. S. District Judge.

1932. District Court reversed by Seventh Circuit Court.

April 18, 1933. Argument in U. S. Supreme Court.

April 29, 1933. Case ordered set for re-argument.

June 30, 1933. Factor supposedly "kidnapped". (R. 29)

October 9, 1933. Case re-argued in U. S. Supreme Court.

Dec. 4, 1933. U. S. Supreme Court affirmed the decision of the Seventh Circuit Court.

3. The Course of Litigation.

Touhy was indicted on November 8, 1933, by a grand jury of Cook County, Illinois, for kidnapping John Factor

for ransom. (R. 11) That was also the first day of the Hamm trial before a federal jury in St. Paul which resulted in Touhy's acquittal. (R. 6, 7) The actual kidnapers of Hamm confessed two years later and were sent to prison. (R. 6)

Touhy returned to Chicago after the Hamm trial waiving legal formalities, and stood trial in the Factor case. On the first trial the jury disagreed and was discharged over the protest of the defense at a time when they stood 10 to 2 or 8 to 4 for petitioner's acquittal. (R. 7) A second trial resulted in Touhy's conviction and sentence to imprisonment for 99 years. On appeal the Supreme Court of Illinois affirmed the conviction. (*People v. Touhy*, 361 Ill. 332).

John Factor, Isaac Costner and Walter Henrichsen were the only witnesses who testified on the trial to the identification of Touhy as one of the kidnapers. (R. 16) Of these three Costner, a "surprise" witness (name not furnished to the defendant's counsel in advance of the trial) was in Tennessee at the time of the supposed occurrences in Chicago to which he testified. (R. 62) Investigation after the trial resulted in the defense procuring affidavits from eleven disinterested persons who swore under oath that they had seen Costner in or near Newport, Tennessee, Costner's home, at the time of the kidnapping, thus positively disproving his whole testimony. (R. 62)

Touhy thereupon on February 15, 1938 sought his release by a petition for habeas corpus in the Supreme Court of Illinois. (R. 10) But that court, without opinion, on February 18, 1938 denied him leave to file the petition. This court denied certiorari. (*Touhy v. Ragen*, 303 U.S. 657).

4. The Error Coram Nobis case.

Thereafter in 1945 Touhy's attorney, Charles P. Megan, learned that Factor had confessed to Thomas C. McConnell, a prominent Chicago lawyer, that his eyes were bandaged during the "kidnapping" so that he could not see anyone but that on the trial he identified Touhy anyway. (R. 2-3, 68-70). This confession of perjury is the principal point in the present Petition for a Writ of Error Coram Nobis. The state has conceded that Factor's testimony at the trial was "indispensable" (R. 15) and Factor himself has considered that his testimony resulted in Touhy's conviction. (R. 14) This confession undermines the entire case on which the prosecution was based.

A word suffices to dispense with the third "identifying" witness, Walter Henrichsen, since his testimony was not properly in the record. Hendrichsen claimed or rather the State's Attorney claimed for him, a privilege against self-incrimination when being cross-examined by the defense. (R. 55-56) His testimony on direct examination should then have been stricken immediately. *State v. Perry*, 210 N.C. 796 (1936) 188 S.E. 639. (R. 56)

Henrichsen is now dead. (R. 54) Costner is in a federal penitentiary at Fort Leavenworth, Kansas, and Factor is in a federal penitentiary at Sandstone, Minnesota. (R. 9) These are the witnesses the State's Attorney relied on for Touhy's conviction. (R. 16)

Touhy's petition for a Writ of Error Coram Nobis seeking a new trial was filed in the Court of his conviction on August 10, 1946. That court sustained a plea that the error coram nobis action was barred by the time limitation in the statutory substitute for the common law writ. The court also sustained a demurrer to the petition. (R. 113) The Supreme Court of Illinois affirmed on both

points, holding that the newly discovered evidence of perjury by Factor was not a ground for relief through coram nobis proceedings and that the five-year limitation in the statute was a complete bar to the petition.

Your petitioner has not been afforded a hearing on the merits of his petition in spite of the strong case made on this record.

SPECIFICATION OF ERRORS TO BE URGED

The first and fundamental error to be urged, is that the Supreme Court of Illinois has denied all relief under Illinois law to which petitioner was entitled under both state and federal Constitutions, because of the discovery, long after final judgment, that in the trial of the kidnapping charge the perjured testimony of Factor, Costner and Henrichsen was introduced and the verdict of the jury rested on that false testimony.

A second error will be urged that the Supreme Court of Illinois has erred in holding that the statutory remedy given by the Illinois Practice Act (R. S. Ill. Chap. 110, Sec. 196) as a substitute for the common law Writ of Error Coram Nobis is barred by the fact that more than five years have passed since the date of the original judgment of conviction.

It will also be urged that because of that ruling petitioner has been deprived of all relief under Illinois law for his unlawful imprisonment and is therefore deprived of his liberty contrary to the Fourteenth Amendment to the Constitution.

And finally the question arises whether in view of the fact that the petitioner has exhausted all remedies under Illinois law this Court should grant certiorari, reverse the judgment of the Illinois Supreme Court in this the error coram nobis case and remand the case for a new trial.

SUMMARY OF THE ARGUMENT.

On the trial of a charge of kidnapping, perjured testimony was introduced by certain witnesses who undertook to identify Roger Touhy as one of the alleged kidnappers.

The perjury was not discovered until eleven years after the final judgment. The evidence so discovered was of such a character as completely to undermine the entire case on which the prosecution was based.

All other remedies for the illegal imprisonment having been exhausted petitioner applied to the Criminal Court of Cook County, Illinois, for relief obtainable by a writ of error coram nobis.

The Criminal Court of Cook County and the Supreme Court of Illinois held that proof of the discovery of the perjured evidence could not be considered in the coram nobis proceeding.

Both of those courts held that relief under the coram nobis act was barred by the lapse of five years since final judgment.

Both of those courts held that the allegations of the coram nobis petition and the statement contained in counsel's suggestions in support thereof consisted of statements of hearsay evidence and conclusions.

The petitioner having been unlawfully deprived of his liberty by imprisonment in the State penitentiary on a judgment based on perjured testimony, and the Illinois courts having denied him the relief he is entitled to under State law, this Court should grant him the protection vouchsafed by the Constitution of the United States by

granting him the writ of certiorari as prayed for in his petition.

Petitioner argues that the five year limitation in the Illinois error coram nobis act applies only to civil actions and not to criminal actions, that it has often been construed by the Illinois Court to refer to civil actions and not to criminal prosecutions.

That by its rulings the Supreme Court has denied to the petitioner Roger Touhy any relief under Illinois law for the illegal restraint of his liberty and that therefore the Federal courts have jurisdiction to give him that relief.

ARGUMENT.

MAY IT PLEASE THE COURT:

It was the contention of petitioner's former counsel, the late Charles P. Megan that while the ancient common law theory of error coram nobis was strict and narrow the modern view is more liberal and that the trend is toward affording a more prompt and direct remedy by way of the error coram nobis route. His exposition of that theory is in the record (R. 16) and is presented by his Suggestions in Support of the error coram nobis petition. We join in the view that delay in the administration of justice is to be deplored and express the hope that the court having before it such a complete statement of the deprivation of petitioner's rights, privileges and immunities under the Federal Constitution may speed the realization of his right to a new trial because the trial resulting in his conviction is vitiated by perjury.

Time Limitation on Error Coram Nobis.

The Supreme Court of Illinois has held that the right to relief under the error coram nobis statute has been barred by the limitation of the exercise of that right to five years after the conviction. That limitation is in the Civil Practice Act. (R. S. Ill. Chap. 110, Sec. 196.)

The section providing for the statutory substitute for a writ of error coram nobis was first adopted in 1871 (immediately after the present Illinois Constitution went into effect) in an act entitled "An act in regard to practice in courts of record" and it has since been re-adopted always as a part of the Civil Practice Act where it still

appears. The Constitution of Illinois provides (Article IV Sec. 13) that

“No Act hereafter passed shall embrace more than one subject, and that shall be expressed in the title . . .”

The Illinois Supreme Court has heretofore consistently held that a provision governing civil procedure, cannot be included in an act governing criminal procedure unless so expressed in the title of the act.

People v. Horan, 293 Ill. 314 (1920) at pages 318, 319.

Campe v. Cermak, 330 Ill. 463 (1928) at page 468.

Vick v. Commonwealth, 236 Ky. 436 (1930) at p. 443, 33 S.W. 2d 29.

Notwithstanding this provision of the Illinois Constitution and those cases the Supreme Court of Illinois holds that the Civil Practice Act can now be read to apply to criminal actions.

For the sake of brevity we select from Mr. Megan's citations and discussion in support of this position (R. 17-21) the following:

In *People v. Murphy*, 296 Ill. 532 (1921) at pages 533-535 the Supreme Court of Illinois said:

A writ of error is a common law writ, the limitation of which was twenty years.

The limitation sought to be availed of here is contained in section 117 of the Practice act. The title of that act is, “An Act in relation to practice and procedure in courts of record,” and it applies to and controls the method of procedure in civil suits on the law side in trial courts, but it has been held to have no reference, in general, to proceedings in criminal cases in trial courts unless such cases are expressly mentioned (several Illinois cases given in illustration) . . . Except in cases where by express mention or necessary implication the provisions of the Practice

act are made applicable to criminal . . . cases, the method of procedure in criminal cases is controlled by the Criminal Code, found in chapter 38 of the Revised Statutes . . . The plea that the writ was not sued out within three years, therefore, stated no defense to the writ . . . The judgment must be reversed and the cause remanded.

It seems inescapable therefore that the Act which limits error coram nobis proceedings in civil actions to five years from the date of final judgment can have no effect whatever on the twenty year limitation which applied to that remedy at common law and now applies to it in criminal cases.

See also *People v. Chapman*, 392 Ill. 168, (1946) at page 169; *State v. Hardesty*, 132 Md. 172, (1918) at pages 176, 177, 103 Atl. 461.

Untenable Objections to Petition and Suggestions.

The Supreme Court of Illinois also holds that the petition for relief by way of the error coram nobis route is barred because the allegations of the sworn petition are not supported by affidavits of others and are mere statements of conclusions and that the evidence therein set forth is hearsay evidence and not to be considered. It is submitted that a petition for a writ of error coram nobis is in its essence analogous to an offer to prove. It is a statement of what the petitioner will prove in regard to the discovery of the perjured testimony. The objection that it contains hearsay evidence overlooks the analogy which we are suggesting and the purpose and function of the petition.

It is also suggested by the Illinois Supreme Court that because the petition is not supported by the affidavits of either the lawyer to whom John Factor is alleged to have

stated that he committed perjury upon the trial of the kidnapping case or of Factor himself, those statements cannot be taken as true. The petition is sworn to by the petitioner himself. Those facts are also stated by his attorney in his suggestions in support of the error coram nobis petition. In court proceedings an attorney is an officer of the court acting in discharge of his duty to the client and to the court. His statement is of far greater dignity and weight than a mere affidavit. The sanctions for its falsity are more potent and more compelling, for false testimony in an affidavit requires indictment, trial by jury and long delay, whereas, the false statement of an officer of the court in the performance of his duty to the court, is punishable in summary fashion as a contempt of court, and by disbarment.*

The Development of Error Coram Nobis Law.

The petitioner's late counsel in his Suggestions in Support of the petition for writ of error coram nobis which is part of the record established the proposition that the discovery of perjured testimony after judgment is a proper basis for a new trial where the newly discovered evidence is of such a character as completely to undermine the

* Perhaps it is not amiss to suggest that in the Federal Rules of Civil Procedure attorneys for the parties are not required to file affidavits. Their certificates are made sufficient. (Rule 11, FRCP.) The relevant provisions of that rule are as follows: "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated . . . Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit . . . The signature of an attorney constitutes a certificate by him . . . For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action . . ."

entire case on which the prosecution is based. (R. 15) (Citing *People v. Becker*, 210 N.Y. 274 (1914) at page 327, 104 N.E. 396 and *People ex rel. v. Ragen*, 129 Fed. 2d 811 (1942 C.C.A. 7th) at p. 813.)

The petitioner's late counsel also in his suggestions established the proposition that the discovery of perjured testimony after judgment is a proper basis of an application for a writ of error *coram nobis* (R. 16) and cited *Davis v. State*, 200 Ind. 88 (1928) 161 N.E. 375. The court in that case said at p. 106:

And we do not undertake to lay down a general rule of law that a writ of error *coram nobis* should be granted whenever a material witness recants and admits perjury, but in the sound discretion of the court, where, as here, it appears that the verdict most probably would not have been rendered except for such testimony and that there is a strong probability of a miscarriage of justice unless the writ is granted, it should be granted.

The tendency of the courts in modern times is to award the writ of error *coram nobis* more generously than in the ancient days of the common law.

The writ of error *coram nobis* is a living and growing part of the remedial law of the land.

In *U. S. v. Steese*, 144 Fed. 2d 439 (C.C.A. 3, 1944) a forgery case, the court said at page 442:

There is a further point stressed by counsel for the Government. It is that there is no way by which this case, thus sought to be reopened by motion many years after the term has expired in which the judgment of conviction was had, may be opened. Certain it is that the time for motion for a new trial or for an appeal has long since passed. *Habeas Corpus* is not available in this district as petitioner is not here confined. The Supreme Court has expressly refrained from passing upon the question whether district courts

may exercise in criminal cases a correctional jurisdiction at subsequent terms. *We think, however, a court is not helpless to remedy an injustice, if one is proved to have been committed, which goes to the extent of depriving a man of his constitutional rights.* The motion in the particular case may be treated, for this purpose, as a modern substitute for the ancient writ of error *coram nobis*. We think the present question involving protection of one's rights under the Constitution is just as fundamental as those for the protection of which this time-honored writ was devised and used in the early common law procedure.

In *Lyons v. Goldstein*, 290 N. Y. 19 (1943) 47 N. E. 2d 425, the court said at pp. 22 and 25:

We are not concerned with the merits of the intervener's application. The only question which we consider or upon which we pass is whether the tribunal before which the application was made has power, under any circumstances, to hear and determine an application to reopen a judgment of conviction which is based upon fraud and misrepresentation after the judgment has been entered and sentence has been imposed and the defendant has commenced his term of imprisonment. * * *

The inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted [citing two civil cases]. No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent powers of the courts with reference to them. The power was exercised in criminal cases at common law through the writ of error *coram nobis* [citing two cases]. * * * It would be an extraordinary reversal of all precedent to deny to a competent tribunal power over its own judgments in either civil or criminal cases.

In matter of *Morhous v. New York Supreme Court*, 293 N.Y. 131 (1944) 56 N.E. 2d 79, Chief Judge Lehman said at p. 136:

At common law a court of competent jurisdiction had power by writ of error *coram nobis* to set aside its own judgment where it appeared that the judgment complained of would not have been entered if the facts upon which the error is predicated had been presented in the trial court (citing *Robinson v. Johnson*, 118 F. 2d 998.) Analogous jurisdiction to set aside upon motion a judgment obtained by fraud and misrepresentation is undoubtedly inherent in the courts of general civil jurisdiction of this state. Question remained [up to 290 N. Y. 19] whether similar jurisdiction was limited or withheld by the Legislature from courts exercising criminal jurisdiction. In *Matter of Lyons v. Goldstein*, (*supra*), that question was authoritatively decided by a closely divided court. We held that a court of criminal jurisdiction has inherent power to set aside upon motion its own judgment based upon fraud or misrepresentation of an officer of the State depriving a defendant of due process, even though no such power is expressly conferred by the Code of Criminal Procedure; and that limitations contained in the Code, relating to other motions affecting a judgment, do not apply in such case. (cf. *Robinson v. Johnson*, *supra*.) It is hardly open to question that in accordance with the principles formulated in the opinion in *Matter of Lyons v. Goldstein* (*supra*), and authoritatively established by the decision in that case, a motion by the relator in the Court of General Sessions to vacate the judgment of conviction of that court would be an appropriate proceeding in which remedy for the alleged wrong could be obtained upon proof of the truth of the allegations of the petition.

This would be by motion in the nature of a writ of error *coram nobis*.

The development of the law with reference to the writ of error *coram nobis* is most strikingly shown by the developments in Kentucky. Originally the courts of Kentucky

denied the writ of error *coram nobis* in cases like the case at bar.

In a case where such rights were denied in the State Courts a writ of habeas corpus was sought in the federal court.

In a case from the sixth circuit, *Jones v. Kentucky*, 97 F. 2d 335 (1938), the Circuit Court of Appeals said (p. 338):

Nor are constitutional safeguards maintained or respect for the judicial process promoted by convictions secured on perjured testimony. If the new evidence offered in the present case is to be given any credence * * * there is reason to believe that the conviction here assailed was so secured. This is not in criticism of the Attorney General, for its infirmity was not disclosed to him until after the conviction, though it might well have been discovered had reasonable opportunity for investigation been accorded the defendant and his counsel.

The concept of due process as it has become crystallized in the public mind and by judicial pronouncement, is formulated in *Mooney v. Holohan*, 294 U.S. 103, 112. * * * If it be urged that the concept thus formulated but [that is, *only*] condemns convictions obtained by the state through testimony known by the prosecuting officers to have been perjured, then the answer must be that the delineated requirement of due process in the *Mooney* case embraces no more than the facts of that case require [the use by the prosecutor of testimony known to him to be perjured], and that "the fundamental conceptions of justice which lie at the base of our civil and political institutions" must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired.

The petitioner was accordingly discharged on *habeas corpus*, "without prejudice to the right of the commonwealth to take such other proceedings according to law as are consistent herewith." This points straight towards the *coram nobis* procedure.

Later the Kentucky state court again had presented to it, in another case, the question of granting the writ of error *coram nobis*. In this case it overruled its former decisions and followed the decision of the federal court. This case is *Anderson v. Buchanan*, 292 Ky. 810 (1943) 168 SW 2d 48.

Anderson was one of three men who were tried separately for the atrocious murder of Mrs. Miley and her daughter at the Lexington Country Club. Each was convicted and sentenced to death. All three appealed (separately) and their convictions were affirmed. Later, on the verge of his execution, Anderson filed a petition for a writ of error *coram nobis*, and for other remedies, setting up that he had been convicted on false and perjured testimony, the evidence of which was newly discovered by him. The Court of Appeals of Kentucky said (p. 813):

Penney [one of the other two men convicted] was the principal witness against Anderson. * * * Whether other evidence would have been sufficient to convict him is problematical. In his deposition Penney retracts that testimony as it relates to Anderson and states that Anderson had nothing to do with the commission of the crime. * * * Penney further states that he is reconciled to his sentence of death, has given up hope of escaping it and wants to make a clean breast of the matter.

The court reviewed the history of the previous case of *Jones v. Commonwealth*, 269 Ky. 779 (1938), 108 S. W. 2d 816, in which the Court had declined to use the

procedure of the writ of error *coram nobis*, and later Kentucky cases. The court said (p. 817):

These two later opinions indicate an appreciation of the fact that a situation has developed where one convicted of crime and sentenced to death has no remedy in the Courts of Kentucky after expiration of the term of the court at which he was tried even though he can establish his innocence beyond a shadow of a doubt and the prosecuting officers concede that he was convicted upon perjured testimony or that evidence has been newly discovered and he should be exonerated. This is an abhorrent situation. A defendant so placed ought not to have to resort to the courts of the United States to obtain relief. We have been forcefully impressed by the recent opinion of the Supreme Court of the United States expressing its duty to entertain a petition crudely drawn and filed by the defendant himself asking a review of an order of the Supreme Court of Kansas which denied his application for a writ of *habeas corpus*. * * * The petition was construed as sufficient to reveal *prima facie* that the petitioner had been convicted of murder and robbery upon perjured testimony and the suppression of favorable evidence by the prosecuting officers. The court declared that his rights under the due process clause of the Federal Constitution had apparently been denied him and remanded the case to the State court for further proceedings.

* * *

The arm of justice in Kentucky ought not to be any weaker or shorter than it is in the Federal courts. Our State Constitution also insures every person a "remedy by due course of law" for an injury done him in his person. Sec. 14. And we have already recognized that the writ of error *coram nobis* is a part of our "due course of law." As stated in *Hysler v. Florida*, 315 U. S. 411, 86 L. ed. 932:

This common law writ, in its local adaptation, is Florida's response to the requirements of *Mooney v. Holohan*, 294 U. S. 103, for the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process.

The Supreme Court held that "Such a state procedure of course meets the requirements of the Due Process Clause." The situation and conflict of authority have therefore demanded a reconsideration of our decisions.

The court also said (p. 819):

We recognize that it is a rule in several jurisdictions that a writ of error *coram nobis* will not lie on the ground of newly discovered evidence or alleged false testimony. The reasons assigned for the rule are that the defendant might discover or fabricate evidence which would have been material on the trial and require the courts to try the whole case over again, thereby rendering the validity and stability of judgments too uncertain to comport with sound policy, public convenience and safety * * * But in some of those jurisdictions the door has been left open * * * The rule seems to be one of expediency and loses sight of the power of the courts to protect themselves against imposition. It seems to write in an unwarranted exception and to overlook the real purpose of the writ, which is to revest the court with jurisdiction in an extreme emergency and permit inquiry into the important question of whether the judgment of conviction should be vacated because the defendant was unknowingly deprived of a defense which would have probably disproved his guilt and prevented his conviction, and if that probability be established to grant the defendant a new trial of the accusation.

The court also said (pp. 820-821):

In the case at bar the trial court, following the decisions of this court, as we have stated, in effect sustained a demurrer to the petition. We think that was a proper ruling except as to that part which sought a writ of *coram nobis*. As we have also said, the conviction of the petitioner, Anderson, was largely upon the testimony of Penney. Baxter did not testify on Anderson's trial. It seems to us that the petition, with the transcript of their depositions, discloses *prima facie* that there may have been a miscarriage of justice; at least they present allegations of circumstances, substantially supported, which justify further judicial inquiry. Upon a trial of the issues the court

may conclude that the ends of justice do not require that the judgment of conviction be set aside and a new trial of the indictment ordered.

The decision of the Supreme Court of Illinois is contrary to the modern trend of the law. It in effect denies petitioner all relief in violation of his Constitutional rights.

Relief by habeas corpus will also be denied in Illinois under the Habeas Corpus Act of that state. (Ill. Rev. Stat. Ch. 65) The Supreme Court of Illinois will not entertain an original petition for such a writ as it has stated in *People ex rel. Swolley v. Ragen*, 390 Ill. 106, at page 107: "Any petition which raises questions of fact, only, will not be considered. This Court does not try questions of fact." There is serious doubt that the lower courts of the state will entertain petitions for habeas corpus where the Supreme Court of Illinois has already affirmed the conviction as is the case in the case at bar (*People v. Circuit Court*, 369 Ill. 438, at 440-441). The courts of Illinois have thus indicated that they are powerless to enforce the rights given by the Federal Constitution. This abdication of power by the state courts makes the federal courts the only courts where those rights under the Constitution of the United States can be protected.

Simplification of the Issue.

This record may seem to embrace too broad a field, but the necessity of showing that the petitioner had exhausted all his remedies under state law made it necessary to present a full record on that point. The field is broad but the relief sought is very simple. Roger Touhy was convicted on perjured testimony and thus unlawfully deprived of a fair trial and of his liberty. He therefore seeks a new trial. We are not here seeking a review of any other judgment than the judgment entered in this error coram nobis proceeding. By that proceeding we ask for a new

trial in the original proceeding as to which error coram nobis is alleged.

Proof of the perjured testimony is supported not only by the confession and the testimony of witnesses but it is supported also by the inherent probabilities of the case appearing from facts and circumstances as to which there can be no dispute.

One of the first significant circumstances is the growth of hostility on the part of Al Capone toward Touhy, and Factor's affiliation with Capone, and Factor's joinder in that hostility (See Opinion in *People v. Touhy*, 361 Ill. 332 at p. 346).*

Factor contributes a new element to that hostility. He himself is a fugitive from justice. In 1932 he found himself faced with extradition proceedings. (R. 25) His first escape was through the holding of a United States District Judge that the crime in England for which extradition was sought had not been made a crime in Illinois. (R. 26) That decision set him at liberty for the time being. An appeal was taken and the Circuit Court of Appeals reversed the decision. Certiorari was allowed and the case argued on April 18, 1933. On April 29, 1933 this Court set the case for re-argument. It was reargued October 9, 1933. (R. 25) It had been made clear to him that a warrant of extradition could be kept alive only 60 days. (R. 24-25) He must find some way of maintaining his freedom from arrest until the expiration of the 60 day period. In June 1933 he saw the day of reckoning approaching. On June 30, 1933, the alleged "kidnapping" proceeding was planned by someone. Factor had the strongest motive for plan-

* In the opinion Mr. Justice Jones reciting facts presented in that case says "That a gang war existed in Cook County and the syndicate endeavored to exterminate Touhy and his associates by assassination."

ning that "kidnapping" as a rescue from extradition. Factor's confession and the affidavits of witnesses are strong proof that his testimony and that of his accomplices was false.

If the testimony was false, we urge with deference that technical rules of evidence should not be set up to deprive Touhy of his right to a new trial.

In cases which deal with the effect of the introduction of perjured testimony and declare it to invalidate the judgment, one frequently finds the words "especially when the prosecuting officer knows or was in a position to have known its falsity". The word "especially" is significant and important. If that word had not there been used the statement would mean that proof of knowledge or means of knowledge is necessary to the invalidating effect of perjured testimony. The use of the word "especially" negatives that construction and defeats any such argument. It is the wilful falsity of the statement which deprives the accused of his constitutional right to a fair trial.

The Controlling Case.

We now come to a brief discussion of the case which is here controlling, *Woods v. Nierstheimer*, 328 U.S. 211, 214. In that case the Supreme Court speaking by Mr. Justice Black at page 214, says:

"According to the state, the denials of petitioner's applications rested on the separate and distinct ground that in the Illinois state courts habeas corpus is not the proper remedy for relief from judgments violating due process of law in the manner here alleged. The contention is that the exclusive relief against such judgments is provided by a statutory substitute for the common law writ of error coram nobis, c. 110, par. 196, Illinois Revised Statutes, 1945. The petitioner counters by calling attention to the fact that the statutory remedy is not available unless brought

within five years after the rendition of a judgment; that the judgment and sentence against petitioner was rendered more than five years ago; that consequently, if petitioner has no remedy for habeas corpus, he has no remedy at all; that we should not assume that Illinois grants no relief to one whose imprisonment violates rights protected by the United States Constitution, cf. *Smith v. O'Grady*, 312 U.S. 329, 85 L. ed. 859, 61 S Ct 572, and that we should therefore hold that habeas corpus is available to the petitioner. From our investigation of the law of the State of Illinois we conclude that the denials of the applications in this case could have rested, and probably did rest, on the ground that habeas corpus is not the proper remedy in cases such as the one before us. For this reason we are without power to review the judgments, see *Williams v. Kaiser*, 323 U.S. 471, 477, 89 L. ed. 398, 403, 65 S Ct 363, and the writs of certiorari must be dismissed. . . . ”

The court also said at pp. 216-217:

“But we do not know whether the State Court will construe the statute so as to deprive petitioner of his right to challenge a judgment rendered in violation of Constitutional guarantees, where his action is brought more than five years after rendition of the judgment. Nor can we at this time pass upon the suggestion that the Illinois statute so construed would itself violate due process of law in that a denial of that remedy, together with a denial of the writ of habeas corpus, would, taken together, amount to a complete deprivation of a state remedy where Constitutional rights have been denied. We could reach that question only after a denial of the statutory substitute for the writ of error *coram nobis* based on the statute of limitations had been affirmed by the Supreme Court of the state.”

The Supreme Court of Illinois has now so decided and this court has now reached that question. The Court then concludes at p. 217:

“Furthermore it cannot be doubted that if the State of Illinois should at all times deny all remedies to

individuals imprisoned within the state in violation of the Constitution of the United States, the federal courts would be available to provide a remedy to correct such wrong. *Ex parte Hawk*, 321 U.S. 114, 88 L. ed. 572, 64 S. Ct. 448."

Here the petitioner Roger Touhy stands exactly where the Court has said one must stand in order that his rights under the Federal Constitution may be enforced by a federal court. He is remediless in Illinois because of the decisions of the Courts below in this error *coram nobis* proceeding.

Petitioner's allegations in his petition and the statements of his counsel in suggestions in support thereof have not been denied. Judgment has been entered against him without hearing as to the truth of the allegations of perjured testimony. Those allegations must therefore be taken as admitted. Under the doctrine announced in the above quotations from the *Woods* case it seems that all the requirements of that case have been met.

We therefore respectfully submit that this Court should grant the writ of certiorari here prayed for and reverse the judgment of the Supreme Court of Illinois and remand the case for a new trial.

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August 15, 1947.

